RECORD AND BRIEF

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TC HEARTLAND, LLC D/B/A
HEARTLAND FOOD PRODUCTS GROUP,

Petitioner,

v.

KRAFT FOODS GROUP BRANDS LLC,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF OF THE ELECTRONIC FRONTIER FOUNDATION AND PUBLIC KNOWLEDGE AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

Fourco Glass Co. v. Transmirra Products Corp. held that 28 U.S.C. § 1400(b) "is the sole and exclusive provision controlling venue in patent infringement actions, and . . . it is not to be supplemented by the provisions of 28 U.S.C. § 1391(c)." 353 U.S. 222, 229 (1957).

In 1988, Congress enacted a bundle of twenty-three "miscellaneous provisions" that included an amendment to § 1391—but not § 1400. Nevertheless, the Federal Circuit subsequently held that the amendment effected an overruling of *Fourco*, such that "§ 1391(c) is to supplement § 1400(b)." *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1580 (Fed. Cir. 1990).

The question presented is:

Did the Federal Circuit err in holding *Fourco* overruled by statute, such that § 1400(b) was no longer the sole and exclusive provision controlling venue in patent infringement actions?

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INTEREST OF *AMICI CURIAE*

The Electronic Frontier Foundation[1] ("EFF") is a nonprofit civil liberties organization that has worked for over 25 years to protect consumer interests, innovation, and free expression in the digital world. EFF and its more than 26,000 dues-paying members have a strong interest in helping the courts ensure that intellectual property law serves the public interest.

Public Knowledge is a non-profit organization that is dedicated to preserving the openness of the Internet and the public's access to knowledge, promoting creativity through balanced intellectual property rights, and upholding and protecting the rights of consumers to use innovative technology lawfully. Public Knowledge advocates on behalf of the public interest for a balanced patent system, particularly with respect to new and emerging technologies.

The Electronic Frontier Foundation and Public Knowledge have previously served as *amici* in patent cases. *E.g.*, *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923 (2016); *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014); *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120 (2014); *Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014).

[1]Pursuant to Supreme Court Rule 37.2(a), all parties received appropriate notice of and consented to the filing of this brief. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The federal district courts have a purpose, expressed in their very first Rule of Civil Procedure, "to secure the just, speedy, and inexpensive determination of every action and proceeding." Yet in one area those district courts are forced to fail at this mission: in the choice of forum in patent litigation. They are forced to fail by a misreading of the statute for venue in patent cases. Correction of that misreading, which is the issue of this case, is an important issue that requires this Court's review.

Venue law has long sought to promote fairness and justice to litigants by ensuring limits on the courts before which a defendant may be haled. Patent cases have, for an almost equally long time, presented a special case requiring a special statutory limitation on venue. This Court has consistently found special limits on patent venue proper. Yet the Federal Circuit in *VE Holding Corp. v. Johnson Gas Appliance Co.*, in reversing course and opening up practically nationwide venue in patent cases, ignored not only this consistent line of law but also the basic notions of fairness that underlie the venue doctrine itself.

The error of *VE Holding* is exacerbated by the lack of any other jurisprudential vehicle for protecting that requisite fairness in judicial forum selection. Traditionally, personal jurisdiction and declaratory judgment actions serve in tandem with venue to counterbalance a plaintiff's choice of forum in a lawsuit. But Federal Circuit cases sharply limit the effectiveness of both personal jurisdiction and declaratory judgments in curtailing patent plaintiffs' choice of forum. Thus, venue law is especially important in maintaining the guarantee of fairness that the federal judiciary promises to all parties before it.

As a practical matter, unbridled venue under *VE Holding* has led to a remarkable situation of forum shopping in patent cases. Even more remarkably, evidence suggests that this arrangement may be drawing courts into competition to *attract* patent owners—the ones with unilateral choice over forum—by adopting practices and procedures favorable to patent owners. And evidence suggests that this forum shopping has tangible, substantive effects on outcomes, a result contrary to principles of law and contrary to the very existence of the Court of Appeals for the Federal Circuit, an institution designed to eliminate a perceived problem with forum shopping for favorable substantive patent law.[2]

VE Holding held that a minor, little noticed "miscellaneous" amendment to the general venue statute 28 U.S.C. § 1391 controlled over the patent-specific venue statute 28 U.S.C. § 1400 Congress enacted decades earlier. In doing so, *VE Holding* took a small, inconsequential change and dramatically shifted the balance Congress had carefully crafted. It was incorrectly decided, and it is creating ongoing and increasing problems for the contemporary patent system. This Court should grant certiorari, overrule *VE Holding* and the decision below, and hold, once again, that § 1400 is the exclusive venue statute for patent cases.

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[2] *See* Charles W. Adams, *The Court of Appeals for the Federal Circuit: More than a National Patent Court*, 49 Mo. L. Rev. 43, 57 (1984).

ARGUMENT

I. PREVAILING PATENT VENUE LAW IS FUNDAMENTALLY UNFAIR AND CONTRARY TO BASIC PRINCIPLES OF THE FEDERAL JUDICIAL SYSTEM

The importance of the error of *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574 (Fed. Cir. 1990), is made strikingly apparent in view of one of venue law's key purposes, namely to ensure fairness in choice of forum. Returning the patent venue statute to a position of greater fairness is a matter of special importance, not just to litigants but also to the federal judicial system overall, a matter warranting review on certiorari.

A. VENUE IS PREMISED ON FAIRNESS TO LITIGANTS, ESPECIALLY DEFENDANTS

The fundamental policy underlying venue is fairness to both sides of a civil suit. As this Court has said, "venue is primarily a matter of convenience of litigants and witnesses." *Denver & Rio Grande W.R.R. Co. v. Bhd. of R.R. Trainmen*, 387 U.S. 556, 560 (1967); *see also Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 167–68 (1939). "Venue rules traditionally have served to ensure that proceedings are held in the most convenient forum." Cass R. Sunstein, *Participation, Public Law, and Venue Reform*, 49 U. Chi. L. Rev. 976, 980 (1982).

Venue law is especially concerned with protecting defendants from lawsuits in unfair places. "In most instances, the purpose of statutorily specified venue is to protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial." *Leroy v. Great W. United Corp.*, 443 U.S. 173, 183–84 (1979) (cit-

ing, e.g., *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 493–94 (1973)); *see also Reuben H. Donnelley Corp. v. FTC*, 580 F.2d 264, 269 (7th Cir. 1978) ("Historically, venue has been geared primarily to the convenience of the defendant . . . .").

These concerns of fairness for defendants have motivated jurisprudence on patent venue. In *Stonite Products Co. v. Melvin Lloyd Co.* it was noted that the original Judiciary Act had a permissive venue provision "allowing suit wherever the defendant could be found." 315 U.S. 561, 563 (1942) (citing Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 79; Jurisdiction and Removal Act of 1875, ch. 137, § 1, 18 Stat. 470, 470). In response to the "abuses engendered by this extensive venue," subsequent statutes repeatedly cut back on expansive venue until the Act of Mar. 3, 1897, which defined venue for patent suits. *See* ch. 395, 29 Stat. 695; *Stonite*, 315 U.S. at 563–66. That patent venue statute specifically "was a restrictive measure, limiting a prior, broader venue." *Stonite*, 315 U.S. at 566. *Stonite* thus reaffirms, in the specific patent context, the general principle that venue serves to protect defendants from plaintiffs' unbounded choice of court.

B. The Federal Circuit's *VE Holding* Decision Allows Patent Owners Nearly Unlimited Choice of Venue

Patent venue law in view of *VE Holding* entirely upended the principles of fairness and protection of defendants, by allowing patent plaintiffs in most cases to have unilateral choice of any district court in the nation.

For generations patent venue was exclusively controlled by a patent-specific statute, most recently 28 U.S.C. § 1400. This Court has long rejected any reading of

specific patent venue statutes that incorporated the provisions of other, more general venue statutes. *See Stonite*, 315 U.S. at 563; *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 229 (1957).

The 1988 amendments to 28 U.S.C. § 1391(c) made no indication that they affected *Stonite* or *Fourco*—indeed they left no indication that they affected § 1400 at all. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, sec. 1013, 102 Stat. 4642, 4669 (1988).[3] Instead, the House report treated the changes to § 1391(c) as "miscellaneous amendments" regarding "relatively minor discrete proposals" to the venue statute. H.R. Rep. No. 100-889, at 66 (1988). Nevertheless, *VE Holding* extrapolated from these "relatively minor" amendments a sweeping change to venue law, abrogating this Court's precedents and changing the meaning of § 1400 to incorporate for the first time § 1391(c).

The result of *VE Holding* is anything but "relatively minor." One commentator at the time described the holding "dramatically alter[ing] longstanding common and statutory law" that had long been advocated for by a "vocal group," yet consistently rejected by the Supreme Court. John A. Laco, *Venue in Patent Infringement Actions:* Johnson Gas *Fouls the Air*, 25 Loy. L.A. L. Rev. 1107, 1107, 1117–18 (1992). As a result of *VE Holding*, a patent owner may sue an accused corporate infringer wherever personal jurisdiction exists. *See VE Holding*,

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[3] If anything, the amendments seem to have been intended to condense the scope of corporate venue, not expand it. *See* H.R. Rep. No. 100-889, at 70 (1988) (finding it improper that "a corporation that confines its activities to Los Angeles (Central California) should not be required to defend in San Francisco (Northern California)"). *VE Holding*'s conclusion that the amendments expanded patent venue is especially curious in view of Congress's apparently opposite intent.

917 F.2d at 1583. As discussed below, for many patent defendants this is practically no limit. Thus patent owners can select the most desirable forum for their purposes; as then-Professor (now Federal Circuit judge) Kimberly Moore wrote, "Anything Goes." Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. Rev. 889, 894 (2001).

The decision in *VE Holding* runs directly contrary to these longstanding Congressional and Supreme Court policies surrounding venue, especially those concerned with fairness and convenience for patent defendants who currently may be haled before virtually any federal court in the land.[4] The harm of that error potentially reaches all facets of industry, rendering this issue an important one ripe for review.

C. There Is No Counterweight to This Substantial Boon to Patentees, Due to Other Federal Circuit Law

The importance of a correct venue standard is heightened because the other ordinary safeguards of fairness in choice of forum—personal jurisdiction and declaratory judgments—are ineffective in the patent context.

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[4]That corporations in non-patent suits may be subject to broad venue is no justification for patent defendants to be subject to the same. Patent venue has been a special case for over a century, *see Stonite*, 315 U.S. at 565–66, and several reasons justify that special treatment. For example, patent infringement can occur without any knowledge of a patent or its infringement. *See* 35 U.S.C. § 271(a). Thus there is a particular need to protect a defendant who is completely unaware that it may be violating patent rights. Additionally, personal jurisdiction often serves as a real limitation on choice of forum in non-patent cases, but it does not in patent cases. *See* Section I.C(1) *infra* p. 8.

1. Under current personal jurisdiction law of the Federal Circuit, a company that sells an allegedly infringing product nationally can generally be sued in any district in the nation, thus making venue proper in any district in the nation.

In *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, the Federal Circuit, although declining to specifically adopt a "stream-of-commerce" theory, held that personal jurisdiction was proper where "defendants, acting in consort, placed the accused fan in the stream of commerce, they knew the likely destination of the products, and their conduct and connections with the forum state were such that they should reasonably have anticipated being brought into court there." 21 F.3d 1558, 1566 (Fed. Cir. 1994). Subsequent cases have held that purposefully shipping an accused product into a forum state through an established distribution channel, with the expectation that the goods would be sold in that state, is sufficient for personal jurisdiction. *See, e.g., Nuance Commc'ns, Inc. v. Abbyy Software House*, 626 F.3d 1222, 1234 (Fed. Cir. 2010).

Indeed, the Federal Circuit held that the mere likelihood of future distribution was sufficient. In *Acorda Therapeutics Inc. v. Mylan Pharmaceuticals Inc.*, the Federal Circuit held that a patent defendant was subject to personal jurisdiction in Delaware by virtue of a drug approval application filed with the government. *See* 817 F.3d 755, 764 (Fed. Cir. 2016). While the defendant had never sold an allegedly infringing item in Delaware, the Federal Circuit found personal jurisdiction on the grounds that the drug approval application expressed intent to sell the drug nationally, and the defendant's *planned future conduct* gave rise to the requisite mini-

mum contacts in Delaware (and, by extension, every jurisdiction in the country). *See id.* at 762–63.

In sum, personal jurisdiction provides little limit on the courts before which a patent defendant may be brought, because current law regularly permits nationwide personal jurisdiction.

2. Declaratory judgments under 28 U.S.C. § 2201(a) might also counterbalance the ability of a patent owner to choose the forum of any litigation. Generally, the Declaratory Judgment Act allows an accused infringer in some circumstances to initiate legal proceedings first; encompassed in this ability is that the accused infringer "can preempt the venue choice of the plaintiff." J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. Pa. L. Rev. 631, 644 (2015); *see* Lisa A. Dolak, *Declaratory Judgment Jurisdiction in Patent Cases: Restoring the Balance Between the Patentee and the Accused Infringer*, 38 B.C. L. Rev. 903, 911 (1997).

Yet patent owners can manipulate the selection of judicial forum even with declaratory judgment cases. Many such cases are filed against patent assertion entities, firms that "use patents . . . primarily for obtaining licensing fees." *Commil USA, LLC v. Cisco Sys., Inc.*, 135 S. Ct. 1920, 1930 (2015) (quoting *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 396 (2006) (Kennedy, J., concurring)). Such entities have as their only business activity the sending of patent demand letters and the filing of patent infringement suits.

A declaratory action may be filed in a court with personal jurisdiction over the declaratory defendant (here, the patent assertion entity). Ordinarily, personal jurisdiction is a case-specific determination incorporating notions of "fair play and substantial justice." *Int'l Shoe Co. v.*

Washington, 326 U.S. 310, 316 (1945). But the Federal Circuit instead applies a bright-line rule that the sending of patent demand letters can never give rise to personal jurisdiction. *See Red Wing Shoe Co. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355, 1360 (Fed. Cir. 1998); *see also Avocent Huntsville Corp. v. Aten Int'l Co.*, 552 F.3d 1324, 1333 (Fed. Cir. 2008); *Autogenomics, Inc. v. Oxford Gene Tech. Ltd.*, 566 F. 3d 1012, 1020 (Fed. Cir. 2009).

In other words, when a declaratory judgment suit is filed against a patent assertion entity, the only court with personal jurisdiction over that entity may very well be the court of the entity's place of incorporation. *See* Megan M. La Belle, *Patent Litigation, Personal Jurisdiction, and the Public Good*, 18 Geo. Mason L. Rev. 43, 71 (2010).

Unsurprisingly, then, patent assertion entities go to extraordinary lengths to force jurisdiction down the forum that they prefer (and that accused infringers avoid[5]). Some have even opened sham headquarters in "empty offices with telephone lines that no one answers" to manufacture facts that favor their jurisdiction of choice. Edgar Walters, *Tech Companies Fight Back Against Patent Lawsuits*, N.Y. Times, Jan. 23, 2014, at A23A, *available at* URL *supra* p. xi; *see also Network Prot. Scis., LLC v. Fortinet, Inc.*, No. 12-cv-1106, 2013 WL 4479336, at *7 (N.D. Cal. Aug. 20, 2013) (patent owner "manufactured venue in Texas via a sham").

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[5]One study found that declaratory action filers preferred the Northern and Central Districts of California, the District of Delaware, and the Northern District of Illinois received the most declaratory judgment actions, at 11.4%, 6.5%, 6.1%, and 4.4% of suits filed, respectively. By contrast, the forum overwhelmingly preferred by patent holders, the Eastern District of Texas, received a mere 2.5% of declaratory actions. *See* Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. Cal. L. Rev. 241, app. 5, at 315 (2016).

Lest it seem that this declaratory judgment problem is limited to a specific class of patent owners, consider that any patent owner—operating company or not—can manipulate declaratory jurisdiction through transactional strategy. In *Xilinx, Inc. v. Papst Licensing GmbH & Co. KG*, a patent was owned by a company in the Northern District of California, and the accused infringers were companies in the Northern District of California. *See* 113 F. Supp. 3d 1027, 1031–32 (N.D. Cal. 2015), *appeal filed sub nom. Altera Corp. v. Papst Licensing GmbH & Co. KG*, Nos. 15-1914, -1919 (Fed. Cir. Dec. 21, 2015). But rather than litigating in the obvious forum, the patent owner entered a complex assignment and licensing arrangement that ultimately placed the patent with a German patent assertion entity. *See id.* at 1032. When the accused infringers sought a declaratory judgment in the Northern District of California, the district court found no personal jurisdiction under *Red Wing Shoe*. *See Xilinx*, 113 F. Supp. 3d at 1037–38. *Xilinx* thus demonstrates that any company can effectively circumvent declaratory jurisdiction by transferring the patent to a patent assertion entity.[6]

Although perhaps questionable, the Federal Circuit's holdings both on broad personal jurisdiction over alleged infringers and on narrow declaratory judgment jurisdiction over patent owners are the current law for all patent cases. Correction of patent venue law is the most feasible

[6]EFF and Public Knowledge are participating in *Xilinx* as *amici*, and have asked the Federal Circuit to revisit its law surrounding personal jurisdiction in declaratory judgment actions. *See* Brief of Public Knowledge and the Electronic Frontier Foundation as *Amici Curiae* in Support of Neither Party, *Altera Corp. v. Papst Licensing GmbH & Co. KG*, Nos. 15-1914, -1919 (Fed. Cir. Dec. 21, 2015), *available at* URL *supra* p. ix.

and direct way to restore a degree of fairness in forum selection.

II. Unfairness in Patent Venue Has Serious Practical Effects for Industry, the Judiciary, and the Public

It is not just legal theory that suggests the unfairness of patent venue law under *VE Holding*. Practical experience, borne out in past cases and known litigation trends, shows that the unlimited venue regime has substantially contributed to negative and concerning practices in the patent system. The decisions have given rise to the phenomenon of district court forum shopping, and equally and perhaps more important, district court forum *selling*.

Perhaps in no other area of law is forum shopping more prominent than in patent litigation. A single district—the Eastern District of Texas—heard 44% of all new district court patent cases filed in 2015. *See* Kaleigh Rogers, *The Small Town Judge Who Sees a Quarter of the Nation's Patent Cases*, Motherboard (May 5, 2016), URL *supra* p. x. In November, 2015 alone, a record 467 patent lawsuits were filed there, nearly 55% of all cases filed nationally that month. *See* Jeff Bounds, *Patent Suits Flood East Texas Court*, Dallas Morning News, Dec. 13, 2015, URL *supra* p. ix. One judge within that district heard almost one fourth of all patent cases *in the entire country*. *See* Rogers, *supra*. This is despite the fact that the district has a small population and no major corporate or technology industry.

It is clear that parties are engaged in forum shopping.[7] It is also clear that the Eastern District of Texas is not

[7] *See* Moore, *supra*, at 892; Colleen V. Chien & Michael Risch, *Recalibrating Patent Venue*, Patently-O (Oct. 6, 2016), URL *supra* p. ix

an appropriate forum for many of those that are sued for patent infringement. Since 2008, the Federal Circuit has granted mandamus petitions related to venue arising from that district at least 19 times.[8] Motions to transfer, and often mandamus, have become the recourse of those sued in the Eastern District of Texas that have no ability to argue § 1400(b) controls the forum at the outset. This strongly suggests that it is frequently improper—and as discussed below, harmful—for venue to lie in the Eastern District of Texas.

The practice of forum shopping is "troubling" in itself because it "forces the acknowledgment that the promise of equal, consistent, and uniform application of justice . . . is unattainable." Moore, *supra*, at 893. But it should be

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(finding that 83% of the time, patent defendant has no place of business at location of suit).

[8] *See In re Google Inc.*, No. 15-138, 2015 WL 5294800 (Fed. Cir. July 16, 2015); *In re Apple, Inc.*, 581 F. App'x 886 (Fed. Cir. 2014) (per curiam); *In re Nintendo of Am., Inc.*, 756 F.3d 1363 (Fed. Cir. 2014); *In re Toyota Motor Corp.*, 747 F.3d 1338 (Fed. Cir. 2014); *In re Toa Techs, Inc.*, 543 F. App'x 1006 (Fed. Cir. 2013); *In re Nintendo Co.*, 544 F. App'x 934 (Fed. Cir. 2013); *In re Google Inc.*, 588 F. App'x 988 (Fed. Cir. 2014); *In re Oracle Corp.*, 399 F. App'x 587 (Fed. Cir. 2010); *In re EMC Corp.*, 677 F.3d 1351 (Fed. Cir. 2012); *In re Genentech, Inc.*, 566 F.3d 1338 (Fed. Cir. 2009); *In re TS Tech USA Corp.*, 551 F.3d 1315 (Fed. Cir. 2008); *In re Hoffmann-La Roche Inc.*, 587 F.3d 1333 (Fed. Cir. 2009); *In re Nintendo Co.*, 589 F.3d 1194 (Fed. Cir. 2009); *In re Acer Am. Corp.*, 626 F.3d 1252 (Fed. Cir. 2010); *In re Zimmer Holdings, Inc.*, 609 F.3d 1378 (Fed. Cir. 2010); *In re Biosearch Techs., Inc.*, 452 F. App'x 986 (Fed. Cir. 2011); *In re Morgan Stanley*, 417 F. App'x 947 (Fed. Cir. 2011) (per curiam); *In re Verizon Bus. Network Servs. Inc.*, 635 F.3d 559 (Fed. Cir. 2011); *In re Microsoft Corp.*, 630 F.3d 1361 (Fed. Cir. 2011). These orders directed the Eastern District of Texas to consider a motion to transfer; to give proper consideration to certain facts on a motion to transfer; or to transfer the case contrary to the district court's previous refusal.

even more troubling for at least two reasons: it opens up the possibility that courts have sought to attract patent owners by implementing friendly procedures; and it has demonstrable and substantive effects on outcomes of cases.

A. Scholarship Suggests that Patent Forum Shopping May Be Spawning Troubling Practices Among Courts

If patent owners have their complete pick of the lot for forum, then courts seeking to expand their patent dockets may, consciously or not, implement procedures and practices favorable to patent owners. Indeed, several academic commentators contend that this very well may be happening today.

"Forum selling," described in Daniel Klerman and Greg Reilly's paper of the same name, refers to the phenomenon of judges creating procedural and substantive laws that favor patent owners, in order to attract cases to their district. Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. Cal. L. Rev. 241, 243 (2016).[9] Klerman and Reilly find significant evidence that the Eastern District of Texas has engaged in forum selling. *Id.* at 247–70; *see also id.* at 277–80 (rebutting alternative explanations); Anderson, *supra*, at 659–66 (similarly discussing judicial incentives to attract patent cases).

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[9]Several scholars hypothesize as to court motivations for engaging in forum selling, and identify evidence supporting these motivations. *See id.* at 270–77; Anderson, *supra*, at 661–65. Regardless of actual motivations, the mere possibility that courts engage in forum selling is so detrimental to public confidence in our judicial system that courts should take measures to avoid even the appearance of forum selling.

Many judges in the Eastern District of Texas have adopted certain procedural and substantive rules that benefit patent owners—particularly those with weak patents and no products—to the detriment of small innovators and those accused of infringement. These rules drive up costs to defendants and work to increase settlement pressure untethered to the merits of a particular claim for patent infringement.

For example, two judges of that district—who collectively in 2015 heard almost 40% of district court patent cases in the country[10]—until very recently forbade parties from moving for summary judgment absent prior permission from the court. *See Sample Docket Control Order for Patent Cases Assigned to Judge Rodney Gilstrap* 4 (Nov. 2015) [hereinafter *Gilstrap DCO*], URL *supra* p. xi.[11] These judges also continue to require the production of all relevant documents without regard to the needs of the case in light of such things as resources or amounts in controversy, and without request from the other side, despite recent changes and clarifications made to Federal Rule of Civil Procedure 26. *See Sample Discovery Order for Patent Cases Assigned to Judge Rodney Gilstrap* 3 (July 2016), URL *supra* p. xi. The judges furthermore limit the ability of a party to move for a stay pending the disposition of a summary judgment motion or a motion to dismiss. *Gilstrap DCO*, *supra*, at 5.[12]

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[10] *See* Brian C. Howard, *Lex Machina 2014 Year in Review* 1, 15 (2014), *available at* URL *supra* p. ix.

[11] Judge Schroeder's standing orders also previously contained the same relevant rules as Judge Gilstrap's standing orders. Judge Schroeder's orders may be found at *Docket Control Order* (July 6, 2015), URL *supra* p. ix.

[12] It is likely that many, if not all, of these requirements are inconsistent with the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P.

These rules, although facially neutral, give significant advantages to patent owners with minimal assets, dubious patents or infringement claims, or a goal of extracting undeserved settlements.[13] Non-practicing entities whose sole business is asserting patents—those given broad latitude by the rule of *VE Holding* and insulated by the rule of *Red Wing Shoe*—often have little by way of documents to produce, making the burden of automatic, virtually unlimited document discovery fall primarily on the accused infringer. Similarly, roadblocks to summary judgment and motions to stay favor those with weak patents or claims of infringement, who often seek to delay merits decisions while simultaneously increasing litigation costs on defendants, in order to extract settlements that, although significant, still fall below the cost of trial.

If the meaning of "resides" in § 1400 were restored to its original and unchanged intent, the ability of patent owners to forum shop would be undercut. Importantly, courts could not "compete" for patent litigation as choice

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12, 26, 56 & 83. With respect to the judges' previous rules regarding moving for summary judgment, the Eleventh Circuit has specifically held that an "advance screening" requirement violates both substantive and procedural rights. *See Brown v. Crawford County*, 960 F.2d 1002, 1006–10 (11th Cir. 1992). Also, the rigid and remarkably broad discovery rules contradict the requirement that "the court must limit the frequency or extent of discovery" in appropriate situations, Fed. R. Civ. P. 26(b)(2)(C), and the requirement that discovery "be proportional to the needs of the case," *id.* at 26(b)(1). It can be hypothesized that one reason the judges' rules have gone unchallenged is that denials of summary judgment and general discovery orders are generally not appealable, and mandamus is a rare remedy. *See* Klerman & Reilly, *supra*, at 302 n.338.

[13]The dearth of declaratory judgment filings in the Eastern District of Texas suggests that accused infringers also believe that the jurisdiction's rules are unfavorable. *See* Klerman & Reilly, *supra*, at 277–78.

of forum would likely be dictated by factors controlled by general business advantage and not litigation advantage. The negative incentive structure caused by *VE Holding* suggests the error in that case.

B. Prior Cases Demonstrate that Unlimited Venue Produces Substantive Outcomes Unfairly Favoring Patent Asserters

The reality of today's patent litigation shows exactly how important venue has become. Case studies of patent owner litigation strategies provides strong evidence that patent owners take advantage of nationwide venue and specifically seek out districts such as the Eastern District of Texas in order to leverage litigation advantages that may not otherwise accrue based on merit.

1. Cases show that patent owners have used forum choice to obtain favorable substantive results.

Eclipse IP is a high-volume repeat patent assertor. Between 2010 and 2014, Eclipse IP filed over a hundred lawsuits in the Central District of California. Scheduling Conference Proceedings at 1, *Eclipse IP LLC v. PayByPhone Techs., Inc.* ("*PayByPhone*"), No. 2:14-cv-154 (C.D. Cal. May 29, 2014). Judge Wu, of that district, found that Eclipse IP "appears to generally seek modest lump-sum licensing payments," perhaps suggesting that "Eclipse is leveraging the cost of litigation, rather than the strength of its patents." *Id.* Judge Wu subsequently stated that he was "concerned that at least some of the Eclipse Cases have the potential for resolution to be driven primarily by the costs of defense." Order Coordinating and Staying Cases at 2, *PayByPhone*, No. 2:14-cv-154 (June 10, 2014). Consequently, he stayed all but a small portion of

the cases, and ordered Eclipse IP to file a notice of related cases for any further cases filed related to the same patents. *Id.* at 2–3.

In only three months from issuing that order, Judge Wu invalidated claims from three different Eclipse IP patents on a motion to dismiss, holding that they claimed ineligible subject matter and failed to meet the requirements of 35 U.S.C. § 101. *See* Ruling on Motion to Dismiss for Lack of Patentable Subject Matter, *PayByPhone*, No. 2:14-cv-154 (Sept. 4, 2014) (captioned *Eclipse IP LLC v. McKinley Equip. Corp.*).

Rather than appealing the merits of that now-final order, Eclipse IP apparently attempted to jurisdictionally end-run around it. Using familially-related[14] patents, Eclipse IP filed another round of 53 lawsuits. None were filed in the Central District of California; 40 were filed in the Eastern District of Texas.[15]

One Texas defendant moved to dismiss Eclipse IP's suit, arguing that the claims at issue in Texas were "materially indistinguishable" from those invalidated by Judge Wu and similarly failed to meet the requirements of § 101. *See* Pro-Source's Motion to Dismiss for Failure to State a Claim at 1, *Eclipse IP, LLC v. Pro-Source Performance*

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[14] A patent owner may, under certain circumstances, obtain a so-called "continuation" patent that is generally similar in content and legal treatment to the original patent. *See* 35 U.S.C. § 120. However, a legal determination as to the original patent will not necessarily affect the continuation, which is what allowed Eclipse IP to assert patents in a second forum after the Central District of California had invalidated others. *Cf. SRI Int'l, Inc. v. Internet Sec. Sys., Inc.*, 511 F.3d 1186, 1198 (2008) (of several familially-related patents, holding one anticipated by prior art and others not).

[15] *Amici* determined this by searching PACER for cases filed with "Eclipse IP" as plaintiff and "patent" as nature of suit.

Prods., Inc. ("*Pro-Source*"), No. 2:15-cv-363 (E.D. Tex. June 11, 2015).

Eclipse IP moved to strike the motion, arguing it was not allowed by Judge Gilstrap's rules. *See id.*; Emergency Motion of Plaintiff Eclipse IP LLC to Strike Defendant Pro-Source Performance Products, Inc.'s Motion to Dismiss at 2, *Pro-Source*, No. 2:15-cv-363 (June 24, 2015).[16] Though the motion to strike was denied, *see* Order Denying Motion to Strike, *Pro-Source*, No. 2:15-cv-363 (July 6, 2015), the principal motion, as well as several "me-too" motions filed by other defendants, languished for months. In the interim, the parties engaged in significant discovery, and were required to complete substantially all document discovery. *See* Docket Control Order, *Eclipse IP LLC v. Alfa Vitamin Labs, Inc.*, No. 2:15-cv-353 (E.D. Tex. Aug. 24, 2015) (consolidated case with *Pro-Source*; setting case deadlines). Over time, each defendant settled as litigation costs mounted. On February 25, 2016, over 9 months after the first motion to dismiss was filed, the case ended when the last defendant settled. Order Granting Joint Motion to Dismiss, *Eclipse IP*, No. 2:15-cv-353 (Feb. 25, 2016). The court never ruled on any of the motions to dismiss. *Id.*

Eclipse IP's litigation activities are evidence of a desire to take advantage of the forum-specific procedural and substantive rules offered by the Eastern District of Texas. By filing in that district, Eclipse IP was able to execute on a goal of "leveraging the cost of litigation" to

[16] At the time, Judge Gilstrap did not allow defendants to file motions to dismiss that argued the patent failed to claim patentable subject matter, absent prior leave of court. This Judge's directive has since been superseded by a new procedure. *See* Michael C. Smith, *New ED Tex Tools for Handling Pre-Markman 101 Motions*, ED-Texweblog (Nov. 11, 2015), URL *supra* p. xi.

obtain "modest lump sum payments," something it failed to do in the Central District of California.

2. Cases also show that patent owners choose the most costly and inconvenient fora for defendants.

Consider a situation where two small companies, one in Florida and another in California, are accused of separately infringing a patent. Most convenient to the defendants would be for the Florida company to be sued in Florida, and the California company to be sued in California. It might be reasonable for both companies to be sued in California, or both in Florida. But one would truly struggle to justify suing the California company in Florida and the Florida company in California.

Yet that is precisely what one patent owner did. Shipping and Transit, LLC is one of the most prolific patent lawsuit filers, having opened over 120 cases in the last twelve months.[17] The Florida-based patent asserter has in at least one instance sued a California-based e-commerce retailer in Florida, *see Shipping & Transit, LLC v. LD Prods., Inc.*, No. 9:16-cv-81040 (S.D. Fla. complaint filed June 21, 2016), and a Florida-based corporation in California, *see Shipping & Transit, LLC v. Neptune Cigars, Inc.*, No. 2:16-cv-03836 (C.D. Cal. complaint filed June 1, 2016).

The result is that both companies must now expend additional resources to defend their respective cases on the opposite coast of the country—a result likely to nudge those defendants toward settlement irrespective of the merits of the case. This is a result made possible only by an overbroad reading of the venue statute that results in

[17]In the interest of disclosure, *amicus* EFF notes that it currently represents parties in litigation against Shipping and Transit, although in an action unrelated to those mentioned here.

dispensing considerations of fairness from the choice of forum.

III. Immediate Review of This Case Is Necessary to Prevent the Ongoing Harms of This Unproductive Gaming of Venue

The ability of patent owners to manipulate venue so as to significantly increase costs on defendants—an ability highly constrained by the rule of *Fourco*, and undone by *VE Holding*—suggests Congress did not intend this massive shift in the meaning of its specific venue statute when it made a "miscellaneous" change to the wording of the general venue statute.

The effect of this venue free-for-all for patent owners especially harms small companies and American consumers. They are the ones least able to secure distant counsel, travel to a distant forum, and learn the procedures of a new jurisdiction. They are also the ones most likely to succumb to undue settlement pressure made only greater by patent owners' ability to exploit district court differences in procedural and substantive rules. Insofar as the viability of such companies and consumers is central to the economic and innovative output of this nation, it is especially important to ensure that venue rules work toward fairness and justice for all parties rather than toward unilateral benefits for some. Those interests of fairness and justice favor review of this case and a granting of a writ of certiorari.

CONCLUSION

For the foregoing reasons, this Court should grant the writ of certiorari.

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